United States Court of Appeals

for the Second Circuit

PETITIONER'S REPLY BRIEF

75-4105

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FOR THE SECOND CIRCUIT

75-4105
Docket Nos. 75-4113
75-4118

ITT WORLD COMMUNICATIONS INC.,
RCA GLOBAL COMMUNICATIONS, INC.,
and WESTERN UNION INTERNATIONAL, INC.,
Petitioners and Intervenors,

against

FEDERAL COMMUNICATIONS COMMISSION
and UNITED STATES OF AMERICA,
Respondents,

TRT TELECOMMUNICATIONS CORP.,
Intervenor.

PETITIONS FOR REVIEW OF A MEMORANDUM OPINION AND ORDER OF THE FEDERAL COMMUNICATIONS COMMISSION

REPLY BRIEF OF PETITIONER AND INTERVENOR, ITT WORLD COMMUNICATIONS INC.

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REPLY BRIEF OF PETITIONER AND INTERVENOR, ITT WORLD COMMUNICATIONS INC.

Preliminary Statement

Petitioner and Intervenor ITT World Communications Inc. ("ITT Worldcom") submits this brief in reply to the brief of Intervenor TRT Telecommunications Corp.

("TRT") and the joint brief of Respondents, the Federal Communications Commission ("FCC") and the United States.

Summary of the Argument

At issue in this proceeding is the legality of certain tariff revisions filed by TRT with the FCC and permitted to become effective by that agency.[1] The TRT tariff revisions provided a so-called "off-peak" discount to users of international telex service between the United States and the Federal Republic of Germany ("FRG") or the United Kingdom ("UK"). The reduced off-peak rates were made available to all customers on the basis of eastern time regardless of the customer's actual geographic location. The effect of the use of eastern time as a basis for determining the availability of the rates has been to offer a special afternoon discount available during business hours to telex customers outside the eastern time zone.

The rationale found by the FCC in its Opinion and Order for this discriminatory afternoon discount is either flatly unlawful or, at best, confused, and in either event must be

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[1] TRT's tariff revisions were originally proposed as an experiment of six months' duration, and the revisions were scheduled to expire by their terms on November 30, 1975. On November 26, 1975, the FCC extended the effectiveness of TRT's tariffs for an additional three months, or until February 29, 1976.

Off-peak tariffs identical to TRT's were filed by ITT Worldcom and the other international record carriers (IRCs), because they were forced by competitive necessity to meet TRT's lower rates. As ITT Worldcom stated in its initial brief, the effectiveness of its off-peak tariff has been extended by the FCC until January 31, 1976. ITT Worldcom was under the impression that the FCC had extended the tariffs of all four IRCs for the same period, and so indicated in its initial brief. ITT Worldcom has since learned that TRT received an extension one month longer than the other IRCs, until February 29, 1976.

rejected. Thus, the FCC's Order starts out its discussion of the discriminatory rate by referring to allegations concerning traffic congestion during TRT's peak hours, thereby suggesting that any scheme, whether discriminatory or not, which will have the effect of increasing the volume of traffic during TRT's off-peak hours will find favor with the FCC.

However, as the courts have recognized, such a justification of discriminatory price cutting simply to increase the volume of business done and thereby lower average fixed costs would, if accepted, completely undercut the anti-discrimination provisions of common carrier law.[2] TRT, apparently recognizing this defect in the FCC's justification of its discriminatory rates, attempts to supply a new one. However, the attempt is ineffectual: (1) because the FCC's actions must stand or fall on the articulated grounds relied on by the FCC, and (2) because the additional justification offered by TRT is inadequate.

What TRT argues is that its discriminatory rates are, in fact, not simply designed to increase volume in off-peak hours, but are cost justified in the sense that TRT

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[2] See, *e.g.*, in this connection the following language referring to anti-discrimination provisions set forth in Section 2 of the Interstate Commerce Act, 47 U.S.C. §2, from *Central & Southern Motor Freight Tariff Ass'n* v. *U.S.*, 273 F. Supp. 823, 829 (D. Dela. 1967):

> "Reduced average fixed costs—which always accompany increased volume when there is unused capacity—have never been considered an element of cost-saving in traditional §2 analysis. In fact, as the plaintiffs point out, using such 'cost savings' to justify rate reductions would permit any rate reduction—where the carrier's demand curve was the slightest bit price elastic, and the carrier was not operating at full capacity—since rate reductions would increase demand, allowing the carrier to spread its fixed costs over a greater volume of shipping. Further, any such treatment of average fixed cost economies would run counter to the legislative spirit which is the very heart of §2."

has lower costs for off-peak calls than for calls during peak hours because it experiences shorter holding times, for which it must pay the Western Union Telegraph Company ("WU"), during off-peak hours than it does during peak hours. Thus, TRT argues that it is not treating customers differently but is merely passing through cost savings to the off-peak customer, which originate with the customer himself.

The argument will not withstand scrutiny, if only because the off-peak discount bears no relationship whatsoever to the alleged cost saving but is, on the contrary, 350% larger. It is hornbook law that a discriminatory discount must bear a reasonable relationship to the cost savings so as to avoid concealed discounts without cost justification, designed simply to increase volume.[3]

Clearly, something more than passing through cost savings is at stake, but what it is the FCC has nowhere articulated (except to hint that whatever it is, it is more "worthwhile" than the unspecified cost of eliminating the discrimination by computer reprogramming). Again, TRT has attempted *ex post facto* to supply the omission in the FCC's opinion. But again, TRT's explanation comes too late and is, in any event, inadequate.

What TRT concludes that the FCC intended to say is that the public interest in lower prices (which it terms "TRT's initiative") outweighs the cost of computer reprogramming. Plainly this is not what the FCC says, but even if it were, it is totally unacceptable for one of two reasons: either (1) the cost of reprogramming can be paid out of the huge spread which TRT predicts between the cost sav-

[3] See cases cited at p. 13, fn. 12, *infra*.

ing on off-peak calls and the rate reductions being offered (*i.e.*, the discount can be smaller so that TRT can afford to offer it to all customers, east and west, on an equal basis and can still pass through the cost savings),[4] or (2) it cannot be paid for in this manner. If the cost of reprogramming cannot be paid for in this manner, then the off-peak hour rate reduction *cannot be cost justified, is not economically viable, and can only be financed by eliminating equal treatment to East Coast customers.* In effect, the East Coast customers have subsidized TRT's price cutting initiative.[5] Thus, the "lower prices" for which TRT claims credit are available only if they are limited to an arbitrarily selected part of the general public. It is precisely this kind of arbitrary and unreasonable inequality of treatment among customers that the anti-discrimination provisions of the common carrier statutes were designed to prohibit. Since this is clearly the purpose and effect of the proposed tariff, it should have been summarily rejected. In all events, the FCC is obliged to investigate the charges of illegality.

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[4] The reprogramming cost could also be paid for out of the deep pockets of TRT's parent corporation, United Brands Co. See, *In re ITT World Communications Inc.*, 19 F.C.C.2d 536, 548 (1969).

[5] It is significant that TRT's price cutting initiative is limited to a market in which it plays, at present, a very small role. See, TRT brief at p. 3, n. 3. In other areas in which it enjoys a more substantial share of the market already, it has, on the contrary, sought and obtained from the FCC prohibitions against price cutting initiatives by ITT Worldcom. *In re ITT World Communications Inc.*, 19 F.C.C.2d 536, 547 (1969).

ARGUMENT

POINT I

The briefs of both TRT and the FCC attempt to justify the TRT tariff revisions on grounds which were not relied upon by the FCC in its Order, and which therefore may not be used to uphold that Order on appeal.

Both TRT and the FCC devote the bulk of their briefs to an attempt to establish the lawfulness of TRT's tariff revisions. Both briefs assert that the discriminatory nature of the tariffs is reasonable under the circumstances and, therefore, lawful; TRT goes further and alleges that the tariffs have not been shown to have a discriminatory impact. In taking their respective positions, both TRT and the FCC adduce justifications for the TRT tariff which were not relied upon in the FCC's Order, and which, therefore, cannot properly serve as grounds for upholding that Order on appeal. In its second opinion in the *Chenery* litigation, the Supreme Court formulated this basic principle of administrative law in the following manner:

> "When the case was first here, we emphasized a simple but fundamental rule of administrative law. That rule is to the effect that a reviewing court, in dealing with a determination or judgment which an administrative agency alone is authorized to make, must judge the propriety of such action solely by the grounds invoked by the agency. If those grounds are inadequate or improper, the court is powerless to affirm the administrative action by substituting what it considers to be a more adequate or proper basis. To do so would propel the court into the domain which Congress has set aside exclusively for the administrative agency." *S.E.C.* v. *Chenery Corp.*, 332 U.S. 194, 196 (1947).

As this Court has observed:

> "We must judge the propriety of the [agency's] action solely on the grounds then invoked by it." *Grace Line Inc.* v. *Federal Maritime Board,* 263 F.2d 709, 711 (2nd Cir. 1959).

Thus, "[t]he courts may not accept appellate counsel's *post hoc* rationalizations for agency action; *Chenery* requires that an agency's discretionary order be upheld, if at all, on the same basis articulated in the order by the agency itself." [6]

A. *TRT's assertion that its tariff has not been shown to be discriminatory is erroneous; in any event, the FCC's Order was not based on a finding that TRT's tariff was non-discriminatory.*

The first argument which TRT makes in its brief is that TRT's tariff has not been shown to be discriminatory. The short answer to TRT's argument is that the FCC's Order was not entered on the theory that the TRT tariffs did not discriminate.[7] To the contrary, the FCC was clearly of the

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[6] *Burlington Truck Lines, Inc.* v. *U.S.,* 371 U.S. 156, 168-169 (1962); see also, *Citizens to Preserve Overton Park* v. *Volpe,* 401 U.S. 402, 419 (1971).

[7] As indicated in ITT Worldcom's brief, the Order's entire discussion of the discriminatory nature of TRT's tariff is contained in one ambiguous paragraph:

> "With respect to the claim of discrimination in the use of the Eastern Time Zone as the yardstick for off-peak hours, we conclude that this is reasonable for the purposes of the experiment in view of TRT's representation as to its traffic patterns. TRT states that 84% or more of its telex traffic to U.K. and FRG is transmitted between 9 a.m. and 7 p.m. weekdays, Eastern time. While we do not think it worthwhile in the circumstances to require TRT to reprogram its billing computer for a six month experiment, we would require further justification in the case of any proposal to depart from the use of local transmission times for a permanent service offering." Order, p. 7 (J.A. A-7).

opinion that TRT's use of eastern time rather than local time to determine the availability of its off-peak discount resulted in discrimination against the East Coast customer. The FCC's brief does not argue that the FCC found the TRT tariff to be non-discriminatory; instead, that brief merely maintains that the FCC held the discriminatory nature of the tariff to be justified under the circumstances. Indeed, the FCC's brief candidly states:

> "The Commission did not deny that the use of Eastern time was discriminatory, and it stated that it would require further justification in the case of any proposal to depart from the use of local transmission times for a permanent service offering." FCC brief, p. 6.

Thus, TRT is not merely asking this Court to affirm the FCC's Order on the basis of a justification not relied upon by that agency; it is asking the Court to affirm the FCC by making a finding which was implicitly rejected by the FCC in the Order being reviewed. Such an action by the Court is clearly precluded by the *Chenery* rule, discussed *supra*.

In any event, the arguments TRT advances to show that its tariff is non-discriminatory are without merit.[8] TRT

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[8] TRT's brief asserts ITT Worldcom's allegation that the TRT tariff is discriminatory "is supported by nothing other than the assertion made by ITT's counsel in this Court; there is nothing whatever in the record to support it." TRT seems to imply that ITT Worldcom's challenge to TRT's unlawful discrimination was first raised in this Court and is not part of the record below. That implication is totally without basis. ITT Worldcom's Petition for Suspension and Investigation, its initial pleading before the FCC in this matter, clearly states ITT Worldcom's reasons for contending that TRT's tariff is discriminatory (J.A. A-37–A-49). The FCC's Order explicitly recognized that the other international record carriers had attacked the TRT tariff as unlawfully discriminatory (J.A. A-1–A-9).

makes two basic arguments. First, TRT's brief takes the simplistic position that since all telex users receive the reduced rates for 14 hours a day, there is no discrimination. This ignores the fact that the discrimination in question arises not from the length of the off-peak period but from the differences in the hour of the day at which the reduced rates are made available in different time zones. The fourteen hours during which West Coast users enjoy the lower rates include a substantial portion of the normal business day on the West Coast; the fourteen hours during which East Coast users have access to the lower rates fall entirely outside their normal business day. Thus, even though discounts are available for an equal number of hours to all customers, the West Coast user receives a substantial advantage because some of his "discount hours" fall within the time his business is normally open, and he may, therefore, take advantage of the discounts without incurring the inconvenience and expense of extending his hours of operation, as his eastern rival must do.

Secondly, TRT asserts that the advantage western businesses receive from the use of eastern time is offset by the fact that the West Coast businesses lose the discount after 6:00 A.M. local time, while the eastern user enjoys the reduced rates until 9:00 A.M. Obviously, the East Coast user would be happy to trade his "privilege" of obtaining discounts from 6:00 to 9:00 in the morning, when his business is normally closed in any event, for the opportunity the West Coast user has to obtain discounts during a significant part of his normal business day. As ITT Worldcom observed in its initial brief:

> "[T]he availability in the East of lower rates during inconvenient periods of the day is no substitute for the

> West Coast businessmen's privilege of obtaining discount rates without altering his normal hours of operation."

All of TRT's arguments cannot obscure one simple fact. Under TRT's tariff, East Coast businesses are the only telex users in the country which cannot obtain the benefits of TRT's discount rates during at least part of their normal business day. They alone must incur the effort and expense of extending their usual business hours, if they wish to avail themselves of the discount. As a result, TRT's tariffs are unarguably discriminatory in nature.

B. ***Most of the justifications offered by TRT and the FCC for the discriminatory nature of the tariff must be rejected because they were not relied upon by the FCC; the rest were shown to be inadequate in ITT Worldcom's initial brief.***

In an attempt to show that the discriminatory aspects of TRT's tariff can be justified as reasonable under the circumstances, TRT and the FCC adduce a number of factors which were not relied upon by the FCC in the Order to sustain the legality of the tariff, and which, therefore, cannot be considered by the Court as grounds for affirming the FCC. See the discussion of *Chenery, supra.*

The Order's discussion of the discriminatory nature of TRT's tariff is confined to the three sentences of the paragraph quoted at p. 7, *supra.* The first two sentences state that a large percentage of TRT's telex traffic was handled between 9:00 A.M. and 7:00 P.M. eastern time, while it suffers from low volume during off-peak hours. However, the use of a discriminatory discount without cost justification simply to increase sales by a common carrier which

is experiencing low volume has been flatly condemned by the courts. See, *Central & Southern Motor Freight Tariff Association* v. *United States,* 273 F. Supp. 823, 828 (D. Dela. 1967); see also, *Central & Southern Motor Freight Tariff Ass'n., Inc.* v. *United States,* 345 F. Supp. 1389 (D. Dela. 1972). While such practices may be acceptable among businessmen who are not obliged, as common carriers are, to treat all customers alike,[9] such practices on the part of a common carrier involve (in the absence of cost justification) the kind of preference to customers whose business is particularly valuable to the carrier—*e.g.,* the customer who can do business with the carrier at a more convenient hour —which the anti-discrimination provisions of the common carrier statutes have uniformly prohibited.

In any event, the FCC's rationale ignores the possibility that a non-discriminatory tariff, based on local time rather than eastern time, would adequately shift TRT's peak load into non-peak hours without discrimination against eastern customers. If a tariff using local time were adopted, East Coast users would have the same incentive to defer their telex calls which the present discriminatory tariff gives them, since the present tariff already uses their local time as the yardstick for determining the availability of their discounts. It is entirely possible that enough eastern users would alter their transmission times to reduce or even eliminate the congestion on TRT's telex network, and thereby make it unnecessary to induce additional shifts in TRT's

[9] Section 201(a) of the Communications Act provides:

"It shall be the duty of every common carrier engaged in interstate or foreign communication by wire or radio to furnish such communication service upon reasonable request therefor; . . .".

traffic pattern by offering discounts on a discriminatory basis to other users located in other areas of the country.

TRT, apparently aware of the defect in the FCC's reasoning, seeks to remedy it by its after-the-fact suggestion that the discount is cost-justified. Thus, TRT argues that its traffic studies indicate TRT has to pay less to WU when a telex call is placed during hours which are off-peak in the east, since the absence of traffic congestion during off-peak hours reduces holding times prior to establishing contact with the customer via WU's domestic telex network.

Putting aside the fact that the Court can attach little, if any, significance to TRT's argument without some indication by the FCC in its Order that it considered the question at all, it is clear from the Order itself that TRT's discounts cannot be cost-justified by TRT's traffic studies. For those traffic surveys indicate that TRT's cost savings during off-peak periods is only $.16 for each minute of billable time.[10] TRT's rate reduction during off-peak periods is $.55 per minute,[11] 350% of the cost savings TRT claims. Clearly, TRT is involved in something more than simply passing through alleged cost savings to its customers. As stated by Cardozo, J. in *Postal-Tele. Cable Co.* v. *Associated Press,* 228 N.Y. 370, 378; 127 N.E. 256 (1920):

> "Rates may be fixed in view of dissimilarities in conditions of service. Even then, there must be some reasonable proportion between the variance in conditions and the variance in the charges. Above all, the dissimi-

[10] *I.e.,* $.58 per minute during peak periods less $.42 per minute in off-peak periods. Order, p. 3 (J.A. A-3).

[11] *I.e.,* $2.55 per minute during peak periods less $2.00 per minute for off-peak periods. Order, p. 1 (J.A. A-1).

laries must be in truth the basis of the schedule, the determining principle of conduct, and not a mere pretext or cover for partiality and oppression."[12]

What value there may be in TRT's discount apart from the pass through of minor cost savings is completely unidentified by the FCC, which merely states in conclusory fashion that "we do not think it worthwhile in the circumstances" to require TRT to reprogram its billing computer to deal with the East Coast on an equal basis.

Once again, TRT seeks to supply the deficiency in the FCC's opinion by asserting (without basis in the opinion) that "the FCC properly considered the interest of the public in receiving reduced rates when it refused to reject TRT's tariff on the basis of its allegedly discriminatory provisions." TRT brief, p. 21. Once again, the FCC's discussion of the discriminatory nature of TRT's tariff contains no indication that such a consideration was entertained, and, under *Chenery,* it should not be considered by this Court.

Moreover, what TRT fails to point out is that either (1) the interest of the public in receiving reduced rates could be accomplished without discrimination by reducing the reduction sufficiently to pay for the computer programming necessary to treat all customers equally, or (2) the reduction cannot be cost justified if all the public must be treated equally because the cost of reprogramming is so great that the whole experiment is not economically viable except on

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[12] And see, *Western Union Tele. Co.* v. *Call Publishing Co.,* 181 U.S. 92, 100 (1901); *Central & Southern Motor Freight Tariff Association* v. *U.S.,* 273 F. Supp. 823, 828 (D. Dela. 1967); *Central & Southern Motor Freight Tariff Association, Inc.* v. *U.S.,* 345 F. Supp. 1389 (D. Dela. 1972).

the basis of the arbitrary exclusion of one part of the public from its full benefits.[13] It is precisely this type of arbitrary inequality in the treatment of customers of a common carrier that the anti-discrimination provisions of the Communications Act were designed to prevent. *American Trucking Assns., Inc.* v. *F.C.C.*, 377 F.2d 121 (D.C. Cir. 1966), *cert. denied*, 386 U.S. 943 (1967); and see *Postal Tele.-Cable Co.* v. *Assoc. Press*, 228 N.Y. 370, 379, 383; 127 N.E. 256 (1920).

In the final analysis, the various arguments advanced by ITT Worldcom, TRT and the FCC as to the possible justifications for TRT's rate structure demonstrate the complexity of the issues raised by TRT's tariff filing and thus serve to prove a point stressed by ITT Worldcom in its initial brief. The FCC has not examined adequately the discriminatory impact of the TRT tariff, and its conclusion that the tariff is justified, therefore, cannot be sustained. Even TRT's brief admits that the FCC could not possibly have resolved the complicated issues presented to it on a rational basis:

> "Obviously, the many issues which would have to be considered by the FCC in the context of determining the lawfulness of TRT's rates—TRT's cost justification, public interest considerations, impact upon communications users, and the like—could not properly be resolved without a hearing." TRT brief, p. 26.

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[13] Which alternative applies cannot be determined because TRT failed to disclose to the FCC and the FCC failed to inquire or determine what the cost of computer reprogramming would be. Clearly, the FCC is in no position to say that it is not worthwhile to reprogram TRT's computer for purposes of the experiment when it does not even know what the cost of reprogramming may be.

To TRT's list of the issues which should have been considered, ITT Worldcom would add one more: the FCC must examine on remand the effect of the discriminatory tariff on the disadvantaged East Coast customer, a consideration which is wholly absent from the FCC's Order.

In short, then, neither the FCC nor TRT in its brief was able to glean from the FCC's ambiguous Order any adequate justification for the FCC's decision. Nor were they able to refute ITT Worldcom's contention that the "FCC has not taken a 'hard look' at the discriminatory impact of the TRT tariff."[14] For that reason alone, the FCC's Order must be reversed and remanded.

POINT II

Neither TRT nor the FCC adequately addresses ITT Worldcom's argument that the Order must be reversed because the FCC applied an erroneous standard of law.

It should be noted that neither the brief of the FCC nor the TRT brief comes to grips with the second point made in ITT Worldcom's initial brief, i.e., that the FCC should be reversed because the FCC applied an erroneous standard of law when it required a lesser justification for the discriminatory effects of an experimental tariff than it would have required if the tariff had been proposed as permanent.

On this question, the FCC's brief does no more than offer a quote from one case, *United Telegraph Workers* v. *F.C.C.*, 436 F.2d 920, 925-26 (D.C. Cir. 1970). That quotation from *United Telegraph Workers* states only that since

[14] ITT Worldcom's initial brief, p. 17, footnote omitted.

experiments may sometimes be valuable, the court would not make as searching an inquiry into the "*factual underpinning*" of an agency's action as it would have made if a permanent program were being instituted. Thus, the quotation deals only with the adequacy of the factual findings made by the agency. The court did not suggest that the standard of law applied by the agency need not be examined, nor did the court intimate that the agency would be free to apply a rule of law to an experimental program which would have been erroneous had it been applied to a permanent offering. Indeed, even a casual reading of *United Telegraph Workers* will reveal that the court carefully examined whether the FCC's action was lawful under the provisions of the Communications Act; the opinion offers no suggestion that the Act can be implicitly repealed or amended merely by denominating a proposed service as experimental.

TRT's brief makes no effort whatsoever to demonstrate that the FCC applied an appropriate standard of law.[15] Instead, TRT attempts to convince this Court that it can uphold the FCC, even if the FCC applied the wrong legal standard, on the incredible theory that the FCC did not have to determine whether TRT's tariff revisions were lawful before it entered its Order denying the petitions to reject the tariff as unlawful. TRT's thesis is that:

> "The FCC did not here purport to determine that the rates contained in TRT's tariff were, in fact, just and reasonable within the meaning of the Communications Act. It merely held that the rates would not be rejected or suspended." TRT brief, pp. 26-27.

[15] TRT brief, p. 26.

Even if TRT were correct in its assertion that the FCC decided nothing more than that the rates should not have been rejected or suspended, it would still be necessary to ask whether the FCC properly understood the applicable rule of law, since a decision to reject or suspend cannot have rested on the mere whim of the agency and must have been based on some conception of whether the rates in question are lawful. There is, however, a more fundamental defect in TRT's argument. For the FCC has not "merely held that the rates would not be rejected or suspended," *the FCC has also decided that the TRT rates would not even be investigated.* Instead of putting the matter down for an investigatory hearing or other further proceedings, the Order finally disposed of all the objections ITT Worldcom and the other IRCs raised to TRT's tariff revisions and allowed the off-peak discounts to go into effect.

The FCC's Order, thus, did not merely determine whether the TRT rates should go into effect pending further investigation.[16] It was a final (erroneous) determination on the merits that TRT's rates were lawful.

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[16] The argument made by TRT that the FCC's refusal to suspend is not reviewable is, therefore, fallacious. A decision whether to suspend *pending further investigation* has been held to be nonreviewable in some situations. See, *Associated Press* v. *F.C.C.*, 448 F.2d 1095, 1103 (D.C. Cir. 1971). But compare Judge MacKinnon's concurrence in that case, 448 F.2d at 1107. If an investigation is in progress, the suspension order determines whether the new rates will be in effect during the relatively short investigatory period. When, however, the agency not only refuses to suspend but *also* declines to investigate further the rate in question, the order is always reviewable, because no further agency action is anticipated and the agency's action therefore in effect determines that the rates are lawful, enabling them to become effective permanently. A case directly in point is *United Telegraph Workers, supra,* in which the FCC's refusal to suspend *or* hold hearings was described as "clearly final for purposes of judicial review." 436 F.2d at 922.

In essence, TRT is asserting that in spite of the significant questions ITT Worldcom and the other IRCs raised as to the legality of TRT's tariff revisions, the FCC could refuse to reject those revisions or to even investigate them further without reaching the issue of whether the tariffs are, in fact, unlawfully discriminatory. Such a position is clearly untenable.

TRT further obfuscates the issues before this Court by asserting that "the FCC has no authority to reject TRT's tariff upon the grounds now advanced by ITT in this Court." [17] Yet two pages later, it admits that the FCC has the power to summarily reject a tariff that is "demonstrably unlawful on its face" as this Court held in *American Telephone & Telegraph Co.* v. *F.C.C.*, 487 F.2d 865, 888 (2d Cir. 1973).[18]

ITT Worldcom's position in this Court has consistently been that the TRT tariff is "demonstrably unlawful on its face" and that it, therefore, should have been rejected by the FCC.[19] The discriminatory impact on East Coast cus-

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[17] TRT brief, p. 22.

[18] The FCC's brief likewise recognizes this principle at p. 3.

[19] TRT suggests that under Section 405 of the Communications Act, ITT Worldcom should not be permitted to urge rejection in this Court because it only petitioned the FCC to suspend and investigate the tariff. TRT misconstrues the statute:

> "On its face, §405, commands only that the Commission be afforded the opportunity to pass on issues. There is no requirement that this opportunity be afforded in any particular manner, or by any particular party." *Office of Communications of the United Church of Christ* v. *F.C.C.*, 465 F.2d 519, 523 (D.C. Cir. 1972).

Here, petitions to reject TRT's tariff were filed with the FCC by both WUI and RCA Global, and the FCC was afforded an opportunity to pass on them. Therefore, ITT Worldcom has every right

tomers of the TRT tariff structure is inherent in the use of eastern time rather than local time and, therefore, can be demonstrated merely by referring to the text of the tariff itself. Moreover, as has been demonstrated in both this brief and ITT Worldcom's initial brief, the justifications offered by TRT for the discrimination are insufficient as a matter of law. Thus, the tariff revisions were patently unlawful and should have been summarily rejected by the FCC.

Even assuming that the TRT tariff was not so inherently unlawful as to require summary rejection, the FCC's Order must nevertheless be reversed and remanded because the FCC failed to investigate sufficiently the discriminatory impact of the tariff, failed to articulate adequately the reasons for its decision, and failed to apply the proper rule of law in reaching its decision.

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on appeal to contend that the FCC should have summarily rejected TRT's tariff. *Wilson & Co.* v. *U.S.*, 335 F.2d 788, 794 (7th Cir. 1964), *remanded on other grounds*, 382 U.S. 454 (1966). Obviously, as a matter of administrative policy, it would be ridiculous to require a party to duplicate arguments already placed before the agency merely to preserve its right to urge them on appeal.

CONCLUSION

For the reasons stated above and in ITT Worldcom's initial brief, the Memorandum Opinion and Order of the FCC should be reversed.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I, John S. Kinzey, a member of the bar of this Court, hereby certify that copies of the printed Reply Brief of Petitioner and Intervenor ITT World Communications Inc. were this 28th day of January, 1976, served upon the following persons, first class mail, postage prepaid.

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